

No. 21180 ✓

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

1966 TERM

C. H. LEAVELL & COMPANY, a  
Texas corporation, and RIVER CON-  
STRUCTION CORPORATION, a  
Delaware corporation, a Joint Venture,  
and ALLISON STEEL MANUFACTUR-  
ING CO., an Arizona corporation,  
Appellants,

vs.

FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation,  
Appellee.

Appeal from the  
United States  
District Court for  
the District of  
Arizona

BRIEF OF APPELLANTS, C. H. LEAVELL & COMPANY,  
RIVER CONSTRUCTION CORPORATION AND  
ALLISON STEEL MANUFACTURING CO.

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**FILED**

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## ABBREVIATIONS

Fireman's Fund (Fireman's Fund Insurance Company)

Allison (Allison Steel Manufacturing Co.)

El Paso (El Paso Natural Gas Company)

Leavell (C. H. Leavell & Company)

T.R. (Transcript of the Record)

Ex. (Exhibit)



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JURISDICTION

(a) THE DISTRICT COURT

Plaintiff C. H. Leavell & Company is a Texas corporation with its principal place of business in El Paso, Texas. River Construction Corporation is a Delaware corporation with its principal place of business in Fort Worth, Texas. Allison Steel Manufacturing Co. is an Arizona corporation with its prin-

principal place of business in Phoenix, Arizona. Defendant Fireman's Fund Insurance Company is a California corporation authorized to engage in business and engaging in business in Arizona with its principal place of business in San Francisco, California.

The amount in controversy is in the principal sum of \$85,403.00 exclusive of interest and costs.

The jurisdiction of the District Court is therefore conferred by Section 1332, Title 28 U.S.C.

(b) THIS COURT

Written final judgment denying any recovery to plaintiffs was signed by the Court and filed and entered by the Clerk June 8, 1966. (T.R. 43, 53).

Notice of Appeal to this Court (T.R. 44), Bond on Appeal (T.R. 45, 46), Designation of Contents of Record on Appeal (T.R. 47, 48) and Concise Statement of Points to be Relied Upon by Plaintiffs on Appeal (T.R. 49, 50), were all filed by appellants with the Clerk of the District Court June 15, 1966, and the Clerk, after one Order by the District Judge Extending Time, timely lodged the record (including copies of the Transcript of the Record) in this Court on or about July 29, 1966.

The jurisdiction of this Court is therefore conferred by Section 1291, Title 28, U.S.C.

### STATEMENT OF THE CASE

The cause, as to the issue of the liability of defendant, Fireman's Fund Insurance Company (hereinafter, "Fireman's Fund") to plaintiffs, C. H. Leavell & Company, River Construction Corporation and Allison Steel Manufacturing Co. (hereinafter, "Allison"), under its policy of insurance was, by stipulation of the parties and court order on pretrial, severed and tried separately from trial of the issue as to the amount of loss suffered



by Allison. (T.R. 52). By agreement of the parties (T.R. 52, 53) the cause was submitted for decision upon an "Agreed Statement of Facts" (T.R. 23-29), including a copy of the insurance policy involved (T.R. 7-14), certain plans and specifications for the bridge structure involved (Ex. 1 in Evid.), certain erection procedures, plans and drawings and certain photographs. Since there is no dispute as to the facts further transcript references will be omitted as unnecessary.

El Paso Natural Gas Company (hereinafter, "El Paso"), required a pipe line bridge over the Flaming Gorge Reservoir in Wyoming near Dutch John, in Utah. As appears from the photographs, Exhibits 3 through 7 in Evidence, this was a large engineering undertaking involving large steel structures and heavy cables with related fastenings, braces, booms and structures for the purpose of supporting a large natural gas main across this gorge and reservoir.

El Paso issued an "Invitation to Bid," which invitation included detailed plans and specifications for the pipeline suspension bridge structure (Ex. 1 in Evid.). C. H. Leavell & Company and River Construction Corporation (hereinafter, "Leavell") as a joint venture was the successful bidder and was awarded the contract by El Paso.

Leavell entered into a subcontract with Allison Steel Manufacturing Co. (hereinafter, "Allison Steel") under which Allison Steel was to supply the bridge structure material and fabricate, construct and physically erect the structure. Leavell undertook to and did provide insurance written by Fireman's Fund for the account not only of Leavell and River Construction Corporation, a joint venture, as prime contractor but also "The Account of their Subcontractors."

Prior to the acceptance of this risk by Fireman's Fund and the issuance and delivery by it of the aforesaid policy of insurance, Fireman's Fund had received El Paso's "Invitation to Bid", Plans and Specifications for examination and presumptively an

engineering or other evaluation of these plans and specifications to determine the extent and nature of hazard involved.

Thereafter a policy of insurance was delivered to Leavell written and designated by Fireman's Fund as a "Bridge Builders 'All Risk' Form" ("Exhibit A" to Allison's Complaint, T.R. 7-14) insuring Allison (all parties plaintiff, Allison as a subcontractor but not specifically insured by name)" \* \* as to the property; described and located as follows:

"Single Span Suspension Pipeline Bridge to be located over the Flaming Gorge Reservoir Approximately 12 miles North West of Dutch John, Utah in the State of Wyoming."

Allison Steel engineered and drafted what it termed "erection procedures" which spelled out the various mechanical steps and procedures which it proposed to employ in actually erecting the bridge structure in performance of its subcontract. These shop drawings and related papers were submitted to Leavell and El Paso for review and approval, but they were not submitted to Fireman's Fund *or examined or considered by Fireman's Fund in accepting the risk and issuing its policy of insurance.* (Finding of Fact 5, T.R. 24). (Emphasis added)

The plans and specifications for said bridge called for the erection of a high, generally "H" shaped steel tower on each side of the Flaming Gorge Reservoir supporting a set of 6 "main" pipeline cables anchored to the ground substantially back from the base of each tower. These cables extended from this anchor base to the top of the tower and were to be strung from over the top of the tower extending across the reservoir and gorge to the top of the opposite tower and then in turn brought back to earth and anchored in the ground substantially back from the tower. These cables were 2¼" in diameter and served to support the pipeline across the Flaming Gorge Reservoir as it was suspended by suitable attachments from and below these main or pipeline cables.

A second set of cables was also called for by El Paso's plans

and specifications known as "wind boom" cables. These cables, two in number, served the primary purpose of stabilizing the bridge structure and pipeline against the force of the wind. The end or base of a boom (a long round timber or pole) was to be attached on the side of each tower at approximately one third of the height of the tower from the ground in such manner that it could be raised vertically parallel to and along the side of the tower and thereafter the boom with its base so attached to the tower could be lowered outward so that it extended outward from the tower approximately parallel to the ground and at right angles to the direction of the pipeline cables. As first attached to the tower, the boom was in a raised position substantially parallel to the vertical side of the tower. In this position the wind boom cables were to be attached to the top end of the boom, and after the wind boom cable was attached to its top or outer end, the boom would be lowered so that the boom itself would be substantially horizontal, and the wind boom cable as attached or fastened to the outer end of the lowered boom would parallel the pipeline cables and extend across the reservoir and be anchored to the ground in like fashion to the main or pipeline cables. These wind boom cables were  $2\frac{3}{4}$ " in diameter and substantially heavier than the main pipeline cables.

The method by which Allison Steel proposed to physically position the cables involved was for each main pipeline cable to be first strung across the top of a sheave cluster on the top of each bridge tower and over the reservoir, and then properly anchored on each side of the reservoir beyond the base of each tower in the ground. Following this it was then necessary to lift each main cable from its temporary resting place on top of the sheave cluster and "drift" or move it to its permanent resting place in one of the grooves in the sheave on top of the tower. A sheave is a wheel-like device designed, in this case, to support a main cable but allowing for some movement of the cable due to expansion and contraction of the metal.

The wind boom cables were also to be first stretched or strung across the gorge, and anchored at each end in the ground in the same fashion as the main cables and preliminarily held aloft above the gorge and reservoir by supports affixed to the side of the tower at approximately opposite the end of the boom in its raised position. As raised, the booms extended from the end as attached to the tower about one third of the over-all height of the tower from the ground to about one fourth of the height of the tower from its top. After being so anchored and strung across the gorge and reservoir, they were to be lifted and positioned attached to the end of the wind boom which would then be lowered so that it extended directly outward from its base as attached to the side of the tower to its final stabilizing position, approximately parallel to the ground.

It was necessary for Allison Steel to devise a means for lifting each cable and moving it to its permanent position in the structure. (Just as it had to devise procedures for lifting the booms in place, lifting the steel for the tower in place, and all the other things having to do with the *mechanics of erection and construction* as distinguished from the *general design or method of construction*). To accomplish this mechanical movement and positioning in the bridge structure of these main pipeline cables, a form of derrick was designed and constructed by Allison Steel in its plant in Phoenix from which derrick a block and tackle was to be suspended to lift and drift each pipeline cable into its permanent place.

This derrick consisted of a steel beam with the bottom end so constructed that it could be bolted upright to the top of the tower at the corner of the tower, in appearance, in place, like an upward extension of the steel beam constituting that side of the tower. At the other or top end of this beam, a piece of steel was welded at right angles to the beam giving the derrick, in place, the appearance of an inverted "L". At the end of this steel piece which was so welded to the steel beam, there was a hole

so that a block and tackle could be fastened to this end and employed to lift and move each main pipeline cable as it was stretched on the top of the tower across the gorge and below this derrick head, into its permanent position in the bridge structure. These derricks were only temporarily attached to the tower and were to be detached and removed after serving their purpose in moving and placing the main pipeline cables.

The erection procedure instructions in connection with positioning the wind boom cables did not call for use of a derrick to suspend the block and tackle above the cables but called for the wind boom cables to be lifted and positioned through the use of a block and tackle attached to the top corner of the tower above the wind boom cables.

Allison Steel's workmen, after positioning the main pipeline cables through use of these derricks, then attempted to use the block and tackle fastened to one of these derricks to also position the wind boom cables on the booms. The workmen first started to position the wind boom cables on the downstream side of the tower by using the block and tackle on the derrick on that side. After this procedure was commenced, workmen on that tower noticed that this derrick was starting to twist. The operation was halted and guy lines were attached to the derrick. Thereafter, the positioning of the downstream wind boom cable was completed without incident. The workmen then attached guy lines to the derrick on the upstream side of the tower and attempted to use the block and tackle attached to that derrick to move the wind boom cable on the upstream side onto its wind boom. Due mainly to the fact that there was a defective weld fastening the steel plate to the steel beam leg of the derrick (being the steel plate to which the block and tackle were attached) but also in all probability to the fact that the derrick was not designed for the heavier load of the larger wind boom cables or the strain due to the greater angle of pull against the steel plate, the weld gave way and the wind boom cable fell to the ground, shearing off the upstream wind booms from the

rowers and causing other extensive damage to the towers and the cable itself.

Why the workmen attempted to use the block and tackle attached to the derrick and did not follow the procedures indicated in these shop drawings and use a block and tackle attached to the tower itself in attempting to lift and position this wind boom cable was not established. The Court found that either these workmen had not reviewed the erection procedures specified in the drawings or "took a chance" thereby avoiding the extra work required in going to the top of the tower, disengaging the block and tackle from the top of the derrick and re-attaching it to the corner of the tower at the top of the tower.

The following photographs were marked as exhibits:

*Exhibit 3*—This is a view of the tower where the failure occurred. The photograph was taken prior to the start of cable transporting, the cables in the photograph being temporary guy lines. The derricks are depicted on the top of the tower. The wind booms and wind boom platforms are depicted on the sides of the tower. The red arrow points to the place where the derrick in question failed.

*Exhibit 4*—This photo was taken from the top of the tower looking from the center to the edge of the tower, showing the derrick fastened in place to the top of the tower and depicting the base of the derrick, the lower portion of the main part of the derrick, and the lower portion of the lateral stabilizing member of the derrick.

*Exhibit 5*—This photograph of the tower was taken after the failure had occurred. It is taken from the north looking south and thus is taken from the same direction as Exhibit 3. The drawing which has been made on this exhibit illustrates the manner in which the wind boom cable was being moved at the time the derrick failed. The arrow at the top of the photo



points to the derrick which failed. Point number 1 on the photo is the place from which the cable was to be moved after having been transported across the gorge. Point number 2 illustrates the position of the end of the wind boom to which the cable was being moved when the failure occurred. Point number 3 on the photo depicts the position of the lateral pulling force being used to move the cable laterally at the time of the failure. The dotted line between the arrow and point number 2 depicts the approximate position of the block and tackle being used to provide the vertical lift for the wind boom cable at the time the derrick failed.

*Exhibit 6*—This photograph depicts the lateral arm of the derrick which broke off the vertical arm of the derrick at the time of failure of the weld.

*Exhibit 7*—This photograph depicts the derrick on the downstream side of the tower showing the damage which occurred to the derrick while the wind boom cable on the downstream side was being positioned.

Allison by its Complaint (as amended) in substance alleged the foregoing fact situation and sought recovery under the policy of insurance from Fireman's Fund in the principal sum of \$89,403.00.

Fireman's Fund by its Amended Answer (disregarding formal admissions and denials), in substance asserted two defenses as follows:

(a) "In this regard, defendant alleges that said loss and damage was caused by error, omission or deficiency in design, specifications or materials, or by a material alteration or change during the policy term in general design or method of construction." (T.R. 21).

(b) ". . . plaintiffs recovery is further precluded by the fact that the general design or method of construction was materially altered or changed during the policy term." (T.R. 21, 22).

The Court found that Fireman's Fund relied upon the following provisions as excusing it from liability under the facts of the case. (Court's Conclusion of Law, T.R. 38).

"The pertinent exceptions and exclusions of the insurance policy which the defendant asserts apply to the facts of this case are as follows:

'This policy shall also cover, but only while situated at the site of operations described herein:

- (a) materials, equipment and supplies intended to become part of such property and
- (b) falsework, temporary trestles and similar structures.

This policy shall NOT cover tools and contractors' equipment.

3. THIS POLICY DOES NOT INSURE LOSS, DAMAGE OR EXPENSE CAUSED BY OR RESULTING FROM:

- (g) Error, omission or deficiency in design, specifications or materials unless fire or explosion ensues and then only for the loss, damage or expense resulting from such fire or explosion;

4. This policy shall be void unless otherwise provided by agreement in writing added hereto, if:

- (a) The general design or method of construction be materially altered or changed during the policy term;'"

The Court found that the use by Allison Steel's employees of the block and tackle attached to the derrick which was designed to lift and position the "main pipeline cables", in attempting to lift and position the "wind boom cables" with the resulting failure of the derrick to Allison's damage "constituted a material alteration or change in the method of construction" which voided the policy and excused Fireman's Fund from all responsibility for the consequent damage to the bridge structure. (T.R. 41,42). Judgment was entered accordingly denying Allison any recovery. (T.R. 43). Hence this appeal.



## SPECIFICATION OF ERRORS RELIED UPON

## I.

The District Judge erred in concluding that the use by Allison's employees of the block and tackle attached to the "main pipeline cable" derrick to lift and position the "wind boom cables" as a result of which misuse the derrick failed causing the damage complained of "constituted a material alteration or change in the method of construction" of the bridge structure which defeated Allison's right to reimbursement for its losses for the reason that the policy provision voiding coverage in the event of a material alteration or change in general design or method of construction had reference only to the general design or method of construction as set forth in El Paso's Plans and Specifications and (contrary to the Court's conclusion) had no reference whatever to the working drawings agreed to between Leavell and Allison Steel as its subcontractor.

## II.

The District Judge erred in reaching the conclusion set forth in Paragraph I, *supra*, for the reason that the erection procedures devised and engineered by Allison Steel for review and approval by Leavell as prime contractor and for its pre-planned guidance in erecting the structure in advance of actual construction constituted no more than proposed or pre-planned engineering solutions to various mechanical problems which would be encountered by Allison Steel in physically lifting and moving heavy objects in the course of actually constructing the bridge in accordance with "the general design *or* method of construction" set forth in El Paso's plans and specifications.

## III.

The District Judge erred in reaching the conclusion set forth in Paragraph I, *supra*, for the reason that Fireman's Fund in issuing its policy of "All Risk" insurance contracted with Leavell and Leavell's subcontractors with reference to and based upon

the "general design *or* construction method" as set forth and spelled out in the plans and specifications accompanying El Paso's "Invitation to Bid" and not with reference to or based upon the so-called construction procedures for use in day by day construction work in building the structures as developed by Allison for its own guidance and the approval of the prime contractor. Hence any deviation from these working drawings was (a) in the discretion of Allison Steel, if approved by Leavell and (b) in any event was not such a change or alteration as was within the contemplation of the contracting parties when the insurance policy was written and so not such an "alteration" as would fall within the language of the contract exclusionary clause.

#### IV.

The Court erred in entering judgment that Allison "take nothing by their complaint" and that defendant have judgment against Allison since such judgment was based upon the Court's erroneous conclusions above set forth.

#### ARGUMENT

The District Judge, in concluding that the unauthorized and unanticipated use, by Allison Steel's employees, of a block and tackle attached to the main pipeline cable derrick to lift and position the wind boom cables relieved Fireman's Fund for the loss arising from this failure to re-position the block and tackle to the tower itself reasoned as follows:

"To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy. There are many negligent acts that one may conjecture this policy was intended to cover: loss that resulted from workmen rushing or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc.

"In this case, the workmen's acts are imputed to the employer, and, therefore, the employer is bound by the intentional deviation from the designated construction plans that occurred

here. The employees either disregarded the plans or were ignorant of them. In either case, the contractor was at fault for either not informing its workers of the plans, or in failing to supervise their conduct.

"The fact that the plans were not approved by the insurance company, prior to the issuance of the policy, is immaterial here since the company had a right to rely on the method of construction to be submitted in accordance with sound engineering principles. In fact, it could be said that, not having seen these plans, or having written them, the defendant is not bound by the usual rule applicable to insurance policies, namely: that the language of a policy is construed most strongly against the insurance company issuing the policy. Certainly the method of construction to be followed in the building of the bridge was incorporated by reference in the policy and was, therefore, an integral part thereof."

It is seen from the foregoing that the District Judge failed to properly analyze the Contract of Insurance, failed to perceive and give effect to its purpose and, finally, read the policy of insurance as if written upon the application of Allison Steel as the prime contractor rather than upon application of C. H. Leavell & Company and River Construction Corporation a joint venture engaging as prime contractor to perform a contract with El Paso Natural Gas Company. The fact that Allison Steel was, at least in practical effect, the sole subcontractor and hence in effect had stepped into the prime contractor's shoes does not in any fashion either enlarge or limit the terms of the policy of insurance written by Fireman's Fund based upon the "Invitation to Bid" and related documents issued by El Paso.

First off, there is nothing in the policy language which requires that the loss insured against be brought about by "accident" in the sense that someone was negligent thereby causing the loss or which indicates that its object was to protect the insured against only "negligent acts that . . . this policy was intended to cover: loss that resulted from workmen rushing

or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc."

Secondly, the question as to whether or not "the contractor was (or was not) at fault for either not informing its workers of the plans or in failing to supervise their conduct" is wholly irrelevant to a proper analysis and construction of this policy of insurance and a determination if this loss is covered thereby. It is no more material than would be the question of the negligence or lack of negligence of a motorist who seeks reimbursement from his collision loss insurance carrier for damage to his car resulting from an accident in which the motorist was involved.

This is a policy of insurance whereby the insurance company engages to make whole the contractor and its subcontractor for loss and damage to the property described while in the course of construction subject to certain exclusions mainly related to property other than that a part of, or intended as an integral part of, the actual structure insured.

That this is without question appears from an examination of the policy of insurance ("Exhibit A" to the Complaint):

"In consideration of the stipulations herein named and of

Three Thousand Five Hundred Forty Five and No/100th dollars premium THE FIREMAN'S FUND INSURANCE COMPANY, hereinafter called the Company does insure C. H. LEAVELL & CO. & RIVER CONSTRUCTION CORPORATION A JOINT VENTURE, FOR THEIR ACCOUNT AND/OR THE ACCOUNT OF THEIR SUBCONTRACTORS, hereinafter called the Assured whose address is 1900 Wyoming Ave., El Paso, Texas for account of C. H. LEAVELL & COMPANY & RIVER CONSTRUCTION CORPORATION A JOINT VENTURE, FOR THEIR ACCOUNT AND/OR THE ACCOUNT OF THEIR SUBCONTRACTORS loss, if any, payable to The Assured or Order for the term of Six Months from the 9th day of March, 1962, at noon, standard time, at location of property described herein

to the 9th day of September, 1962, at noon, standard time, at location of property described herein, for not exceeding \$767,206.00 par of \$767,206.00 being 100% interest on property including foundations, additions, attachments and permanent fixtures belonging to and constituting a part of said property hereinafter referred to as the property; described and located as follows:

Single Span Suspension Pipeline Bridge to be located over the Flaming Gorge Reservoir Approximately 12 miles North West of Dutch John, Utah in the State of Wyoming.

This policy shall also cover, but only while situated at the site of operations described herein:

- (a) materials, equipment and supplies intended to become part of such property and
- (b) falsework, temporary trestles and similar structures.

This policy shall NOT cover tools and contractors' equipment.

1. It is a condition of this insurance that this policy covers the property described herein only while the afore-described property is in process of construction and until completed or until the expiration of this policy, whichever may first occur.
2. THIS POLICY INSURES AGAINST:  
All risks of direct physical loss of or damage to the property covered, except as provided elsewhere in this policy."

There follows an enumeration of losses not insured against:

1. Strikes, riots, vandalism, etc. clause;
2. War clause;
3. Governmental action clause;
4. Failure of insured to preserve the property after damage;
5. Delays;
6. Wear and tear and gradual deterioration, expansion and contraction unless causing collapse;
7. Error, omission or deficiency in design, specifications or materials unless fire or explosion results therefrom;
8. Nuclear reaction, etc. clause.

The policy then provides it shall be void under certain conditions:

- "4. This policy shall be void unless otherwise provided by agreement in writing added hereto if:
- (a) The general design or method of construction be materially altered or changed during the policy term; or
  - (b) Any change takes place in the interest, title or possession of the subject of insurance; or
  - (c) This policy be assigned or transferred.
- "5. This policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

A further detailed review of the policy can serve no useful purpose. Suffice it to say that nowhere in the policy is there even a hint that the negligence or lack of negligence of the insured is material to a determination of the compensability or non-compensability of any loss or damage to the property; nowhere is there any language which even squints at a duty on the part of the insured to properly supervise and instruct its employees.

Certainly, in reading into the policy of insurance written by Fireman's Fund based upon its examination of the plans and specifications for the bridge structure as drawn and written by El Paso Natural Gas Company, procedures agreed to between the prime contractor and its subcontractor spelling out how the subcontractor prepared to discharge its subcontract obligation to the prime contractor, the Court wanders far afield from the contractual agreement actually entered into between Leavell, a joint venture, as prime contractor and Fireman's Fund as insurer of the property rights in the structure to be built.

The "general design and method of construction" was that spelled out in El Paso's plans and specifications. These were the



plans and specifications within the contemplation of the contracting parties; these supplied Fireman's Fund's engineers with the basic detail for an evaluation as to the basic soundness of the structure to be insured and therefore the risk assumed by Fireman's Fund.

The general design or (general) method of construction can, in reason, only refer to the general design or method of construction as set forth in El Paso's plans and specifications. To conclude that a deviation from a plan of procedure outlining how a subcontractor would go about fabricating and erecting the bridge structure which plan was agreed to only between the subcontractor Allison Steel and the prime contractor Leavell (which plan of procedure was never seen or considered by Fireman's Fund) constitute a material alteration or change in the general design and method of construction, appellant respectfully asserts, simply flies in the face of reason. It disregards entirely accepted rules of construction.

If it can be concluded that it is unclear what "method of construction" was within the contemplation of the parties when the policy was issued and that a mechanical procedure for lifting and moving a cable can be stretched to mean a "method of construction," then it is clear that the documents, circumstances and purpose of the parties, as gathered from proof extrinsic the insurance contract may be looked to for guidance.

"In such case the real contract is to be determined from the terms and conditions placed in the contract, considered in the light of the object and purpose of the parties, that is, in the light of the language used, the situation of the parties and the subject matter of the contract. Conversations between the parties had at the time the insurance was effected may be competent."

1 Couch on Insurance 2d §15:57 (1959) and cases cited;

44 C.J.S. *Insurance* §291 (1966);

*Employers Liability Assur. Corp. v. Wasson*, 75 F.2d 749, 753 (C.A. 8, 1935);

*Paddleford v. Fidelity and Casualty Co. of N. Y.*, 100 F.2d 606, 611 (C.A. 7, 1939), cert. den. 306 U.S. 664.

In *Reed v. The Merchants Mutual Insurance Company*, 95 U.S. 23, 30, 24 L.Ed 348, 349 (1877) the Supreme Court, in considering the proper interpretation to put upon an insurance provision defining the risk involved said:

"This case, upon the merits, depends solely upon the construction to be given to the clause in the policy before referred to, namely: 'the risk to be suspended while vessel is at Baker's Island loading;' and turns upon the point whether the clause means, while the vessel is at Baker's Island for the purpose of loading, or while it is at said Island actually loading. If it means the former, the Company is not liable; if the latter, it is liable. . . . Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent falling into mistakes and *even absurdities*." (Emphasis supplied).

We respectfully suggest that the District Judge, by failing to read the insurance contract in the light of the contract documents considered by both the joint venture, Leavell, the applicant for the insurance, and Fireman's Fund, the insurer, as evidencing and stating the risk insured, has fallen into error which approaches in degree the harsh appellation of an absurdity.

Likewise the meaning and intent of an insurance contract is to be determined and construed as of the time it is effective.



1 Couch on Insurance 2d §15:10 n. 17 (1959).

The Court not only laid aside all consideration of what the parties had in view as the risk insured—that arising from the construction of the bridge in question as judged from the plans and specifications issued by El Paso—but also relied upon reasons for denying coverage which find no support, even remotely, in the language of the policy.

The District Judge said:

"To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy. There are many negligent acts that one may conjecture this policy was intended to cover: loss that resulted from workmen rushing or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc.

"In this case, the workmen's acts are imputed to the employer, and, therefore, the employer is bound by the intentional deviation from the designated construction plans that occurred here. The employees either disregarded the plans or were ignorant of them. In either case, *the contractor was at fault for either not informing its workers of the plans, or in failing to supervise their conduct.*" (Emphasis added).

The Court further reasoned:

"The fact that the plans were not approved by the insurance company, prior to the issuance of the policy, is immaterial here since the company had a right to rely on the method of construction to be submitted in accordance with sound engineering principles. In fact, it could be said that, not having seen these plans, or having written them, the defendant is not bound by the usual rule applicable to insurance policies, namely: that the language of a policy is construed most strongly against the insurance company issuing the policy. Certainly the method of construction to be followed in the building of the bridge was incorporated by reference in the policy and was, therefore, an integral part thereof."

The foregoing reasoning coupled with the Court's conclusion that Allison Steel lost the policy protection through "failing to supervise their (employees) conduct" simply wrote all hazard to Fireman's Fund out of the policy. If adherence to "sound engineering principles" plus effective supervision of all employees is required of Allison Steel to keep the policy in effect, Allison Steel (and Leavell) became in practical effect a self-insurer.

The Court's conclusion that somehow the insurance company's position is advantaged by the fact it did not write and never saw the working plans and procedures and therefore the language of the policy in respect thereto is not "construed most strongly against the insurance company issuing the policy" is neither good law nor good logic.

So also the Court's conclusion that these working procedures which, for all the record shows, were not even in existence when the policy was written, and which were, in any event, not even known to or seen by Fireman's Fund were "incorporated by reference in the policy and was (were) therefore an integral part thereof" must be rejected as wholly without support in contract or insurance law and quite at war with reason and logic.

Fireman's Fund was concerned with the over-all soundness of the plan and structure—it was not concerned with the detail of *how* the job was to be done. If it had been concerned with the day to day work and how it was to be accomplished, it would have reviewed the working drawings which Allison Steel prepared for Leavell's approval prior to writing the policy of insurance involved.

Certainly Fireman's Fund should have put its insureds upon notice of the importance it attached to the working procedures prepared for Leavell's approval and made it plain to Allison Steel and Leavell that any deviation from these procedures as agreed to between Leavell and Allison Steel would be fatal to the insurance coverage afforded by the policy if this was in fact its

intent. Certainly when Fireman's Fund limited its review of the design and method of construction of the bridge structure to the plans and specifications prepared by El Paso and wrote and issued its policy of insurance in reference to those plans and specifications, it may not now, after loss sustained, enlarge or add to the "blue print" which all parties had in mind when the policy was written.

The derrick herein involved *is no more than a contractor's tool used in doing the job at hand*. Likewise the block and tackle intended for use on the wind boom cables was a contractor's tool also to be used in doing the job. In principle this derrick and the block and tackle are in the same category as contractors' wrenches, hammers, saws and the many other items of equipment utilized in performing a construction contract.

Indeed, the District Judge concluded that the derrick was a piece of contractors' equipment. So also was the block and tackle. Would it be reasonable to conclude that because a workman used a wrench with a four-foot long handle rather than one with a one-foot handle as the procedures may have indicated thereby twisting the nut to be tightened off rather than just tightening it that the general method of construction was thereby changed?

The method of construction here involved was to string the cables across the gorge, fasten them at each end and position them in their appropriate places in the bridge structure. These cables were to be lifted as indicated to the side of the bridge tower and moved from this resting place and fastened to the raised end of the wind boom. *How* this was to be done was a problem within the special know-how and engineering experience of the contractor. Whether to employ for this purpose a block and tackle, a derrick or a hundred Chinese Coolies pulling upon a rope was for the contractor to decide.

No case has been found in point, insofar as this particular policy exclusion language is involved. General principles of con-

struction as applied to insurance contracts are so well known there is no point in lengthening this brief with a re-run of the cases.

The policy, by definition of Fireman's Fund, is an "all risks" bridge builders policy. The annotator of the subject "Coverage Under 'All Risks' Insurance," Annot., 88 A.L.R.2d 1122, 1125 (1963) states in summary:

Such a policy is to be considered as creating a special type of coverage extending to risks *not usually covered under other insurance*, and recovery under an 'all risk' policy will be allowed for all *fortuitous losses* not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage. The insured will not be entitled to recover where the loss was not due to any fortuitous event, or where it resulted from the fraud, or possibly some lesser degree of misconduct of the insured." (Emphasis supplied).

In *General American Transportation Corp. v. Sun Insurance Office Ltd.*, 239 F.Supp. 844, 845-846 (E.D. Tenn. 1965), the Court held that the risk of negligence by the plaintiff's employees was a risk covered under a policy insuring plaintiffs "'\* \* \* all risks of physical loss or damage \* \* \* from any cause \* \* \* except \* \* \*' . . . '\* \* \* (1)oss or damage due to delay, loss of use, \* \* \* or other consequential loss extending beyond the direct physical loss or damage to the insured property. \* \* \*'" This exclusion concerning "latent defect" is analogous to defendant's interpretation of Section 3(g)'s "deficiency in design, specifications and materials" language.

The Court stated:

"The first question for adjudication, therefore, is whether the casualty was covered by the insurance contract of the parties.

"The Court finds that the damages sustained by the plaintiff resulted from a combination or occurrence of proximate causes, including at least the negligent welding by the plaintiff's workmen in prefabrication of the highly-stressed top

flange of the insert at a truss, designated as truss #3, which apparently failed and permitted an increased deflection of that truss, which in turn resulted in local or general buckling of the bottom chord involved and a transfer of the resulting overloading to adjacent trusses; that, thereupon, the entire false-work system failed almost simultaneously. It would be redundant to undertake to fix any further cause of loss, because '\* \* \* where a policy expressly insures against direct loss and damage by one element, but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause. \* \* \* *Fireman's Fund Ins. Co. of San Francisco v. Hanley*, C.A. 6th (1958) 252 F.2d 780, 783, 785 [1], citing *Pearl Assurance Company, Ltd. v. Stacey Brothers Gas Const. Co.*, C. A. 6th (1940), 114 F.2d 702, 705 [5]. *Any such negligence of the plaintiff's workmen in making the prefabrication welds constituted a fortuitous and extraneous event and was not a necessary or normal consequence of the work. ' \* \* The risk of negligence does not come within any exception to the policy and therefore it is an insured peril. \* \* '* *Associated Engineers, Inc. v. American National Fire Ins. Co.*, D.C.Cal. (1959), 175 F.Supp. 352 [1], citing *Central Manufacturers' Mutual Ins. Co. v. Elliott*, C.A. 10th (1949), 177 F.2d 1011; *Fed. Ins. Co. v. Tamiami Trails Tours*, C.A. 5th (1941), 117 F.2d 794; *New York New Haven & Hartford R.R.Co. v. Gray*, C.A. 2d (1957) 240 F.2d 460." (Emphasis supplied).

See also generally:

*Kraftsow v. Brown*, 94 A.2d 183 (Pa.Super. 1953);

*Glassner v. Detriot Fire and Marine Ins. Co.*,

23 Wis.2d 532, 127 N.W.2d 761, 764 (1964);

*Sincoff v. Liberty Mutual Fire Insurance Co.*,

11 N.Y.2d 386, 230 N.Y.S.2d 13, 183 N.E.2d 899 (1962);

*Jewelers Mutual Ins. Co. v. Balogh*, 272 F.2d 889 (C.A. 5, 1959);

*Associated Engineers, Inc. v. American Nat. Fire Ins. Co.*, 175 F.Supp. 352 (D.C.N.D.Cal. S.D. 1959).

In the last cited case, the District Judge well characterized this type of policy as follows:

"Defendant does not seriously dispute plaintiff's explanation of how the loss was caused but contends that 'poor workmanship' is not a peril covered by the policy. According to its terms the policy provides coverage on all property 'against all risks of physical loss or damage from any cause howsoever and wheresoever occurring' until the work has been completed and accepted. An explicit exception to the above coverage is 'loss or damage caused by wear, tear, gradual deterioration and/or inherent vice.' *This type of policy is generally referred to as All-Risk insurance and it is unlike other types in that it does not specify the events which must cause loss or damage before the insurer is liable; it is a promise to pay upon the fortuitous and extraneous happening of loss or damage from any cause whatsoever.* The uncontroverted evidence reveals that the loss was not attributable to normal wear and tear, inherent vice or gradual deterioration in the pipes or collars, nor to any wilful act by the plaintiff. The entire loss was clearly caused by negligence on the part of Associated, a fortuitous and extraneous event and not a necessary or normal consequence of the work." *Associated Engineers, Inc. v. American Nat. Fire Ins. Co., supra* at 353. (Emphasis supplied).

That negligence is no defense to a property loss claim under a fire or similar policy see:

*Central Manufacturer's Mut. Ins. Co. v. Elliott*, 177 F.2d 1011 (C.A.10, 1950);

*U.S. v. Eagle Star Ins. Co.*,  
201 F.2d 764 (C.A.9, 1952), reversing 196 F.2d 317.

### CONCLUSION

It is respectfully asserted that the judgment of the District Court should be reversed with directions that judgment be entered finding Fireman's Fund liable to Allison for the losses occasioned by the falling of the wind boom cable as claimed by Allison.

Respectfully submitted,  
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney

